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No. 07-459

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In The
Supreme Court of the United States

AARON FLINT, *Petitioner,*

v.

GEORGE DENNISON, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF MONTANA-MISSOULA; THE ASSOCIATED STUDENTS OF THE UNIVERSITY OF MONTANA; KYLE ENGELSON, IN HIS OFFICIAL CAPACITY AS THE ASUM ELECTIONS COMMITTEE CHAIR, ET AL, *Respondents.*

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

Petitioner's Reply

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Argument

In opposing this Court's review of the myriad questions raised by the lower court's analysis and decision, the University ("UM") raises two new points. First, it offers another purpose for limiting student government candidates' speech through expenditure limits, casting doubt on those relied on by the Ninth Circuit. Second, it argues that the case is moot and not saved under the expungement exception because Aaron must show that the record of his censure and removal from office as a result of the challenged law will adversely affect him.

I. UM Offers No New Legitimate Purpose for the Limits.

UM now claims that limiting student candidates' speech during student government elections is a legitimate means of "provid[ing] an opportunity for all qualified ASUM members to compete for the limited number of seats available on the ASUM Senate, and thus to access the opportunities for leadership and policy learning that Senate participation provides." Br. Opp. 18[1]. In short, UM limits student candidates' speech to ensure that speakers have what UM considers an equal chance to effectively persuade the student body.[2] This is permissible, UM contends, because

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[1]UM consistently offered this justification for the challenged limits throughout litigation in the lower courts, but it was not discussed in the Ninth Circuit's opinion.

[2]UM's concern for "students without personal or family resources to spend" and the costs of "matching funds," Br. Opp. 18, 19, are misplaced. Candidates may accept contributions from other students, *see* Br. Opp. 21 n.18, and partial matching funds are provided for only those candi-

ASUM office should be treated as a "popular, over-subscribed class." Br. Opp. 19. In UM's view, candidate speech and student government are subsumed under its educational purpose.

This Court has explained that public school students' First Amendment rights "are not automatically coextensive with the rights of adults in other settings," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), and that the school setting informs the government's interests in limiting student speech. *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). But public university students *are* legally adults, and "[w]ith respect to persons entitled to be there, . . . the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar v. Vincent*, 454 U.S. 263, 268-69 (1981). A university's educational mission "does not exempt its actions from constitutional scrutiny." *Id.* at 268.

UM argues that the university setting creates educational interests that uniquely *subsume* First Amendment interests. In no other context are such restrictions constitutionally permissible. Limiting speech to equalize its effect on listeners is illegitimate, whether offered in a campaign, a government-created forum, or on campus generally.[3] In no non-university

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dates who request it. ASUM Bylaws Article V § 2(G)(4). ASUM could permissibly require these candidates to limit their expenditures. *See Buckley v. Valeo*, 424 U.S.1, 57 n.65 (1976).

[3]It is well-settled that such an interest is illegitimate support for restricting candidates' speech in elections to public office. *See Buckley*, 424 U.S. at 48-49 (restricting speech "in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."); *id.* at 56-57

setting could expenditures for speech during elections be limited, and in no non-election *university context* could students' political and social advocacy be so limited.[4] UM's position therefore depends on the view

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(equalizing candidates' spending not justified by an interest in limiting the total scope of a campaign, and limiting expenditures "might . . . handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign."). Access to even a nonpublic forum is properly granted or denied based on the conditions that government has placed on the use of its property, not equalizing the perceived effect of the resulting speech. *See Perry Education Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 49 (1983). And limiting on-campus, independent student political and social advocacy must be based on well-founded fears of material and substantial disruption of "the work and discipline of the school," a fear that UM does not even allege. *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 513 (1969).

[4]UM apparently recognizes this, as it does not limit students' First Amendment rights in any other university context. *See* Montana Board of Regents of Higher Education Board Policy ("Board Policy") 506.2(3), ASUM Constitution Art. 9, § 1 and ASUM Bylaws Art. IV, § 8(C) (Publications Board "shall oversee the general operations of ASUM-funded publications, without infringing on First Amendment rights."); ASUM Constitution Art. 9, § 3 (Broadcast Board "oversee[s] student radio and broadcast operations without infringing upon first amendment rights"); ASUM Constitution Art. 8, § 5, (all funds shall be managed in accordance with state and federal laws, and Board of Regents policy); ASUM Fiscal Policy 9.1.3 ("Notwithstanding any other provision of these Student Activity Fee funding guidelines, no student news, information, opinion, entertainment, academic or media communication shall solely be deemed ineligible for funding because of the ideas

that student government and its elections are so distinct from these contexts that it is completely subsumed under its educational mission. However, the distinctions UM offers between student government office and "public office," Br. Op. 16, do not justify treating elections to ASUM government as a means of access to a "sought-after history class." Br. Op. 7.

While ASUM and its elections may entail educational benefits, so does holding public office and competing in elections to public office. ASUM officeholders gain useful experience while wielding sovereign power, as does as any public officeholder. The presence of nonvoting faculty members, training in parliamentary procedure, and the "practical deliberative and legislative experience" of ASUM government service, Br. Opp. 3, do not distinguish student government as primarily educational. Participation in federal and state government includes such training and offers similar benefits.

Most important, ASUM government was created by the State of Montana, not UM. The Board of Regents, in which the Montana Constitution vests "government and control" over the entire University of Montana system,[5] affirmatively recognizes ASUM as the legitimate body politic of students and directs that it "shall

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or viewpoints expressed or advocated by the recognized organization.").

[5]The Board of Regents is "a constitutionally independent entity," made directly sovereign over UM by Constitutional Convention in 1972. *See* David Aronofsky, *Voters Wisely Reject Proposed Constitutional Amendment 30 to Eliminate the Montana Board of Regents*, 58 Mont. L. Rev. 333, 363 (1997). Montana places all aspects of the university system under the Board. So UM's view of ASUM is wrong.

be constituted and operated according to [Board policies]." Board Policy 506.2. Board Policy 506.2(1) requires ASUM's constitution, which establishes ASUM government. ASUM government offices are public offices.[6]

The faculty advisor's declaration that "ASUM has been part of the UM educational mission" since its inception, Br. Opp. 2, does not negate this. *See also* App. 48a-50a (noting similar claims). The view of a faculty advisor does not affect ASUM's legal status, and faculty and administration have a tendency to define a university's educational mission to justify control over students' speech. *See Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito and Kennedy, JJ., concurring).

The ASUM Constitution's declaration of its primary responsibility as "serv[ing] as an advocate for the general welfare of the students," ASUM Const. Art. 2, §1, does not negate the lawmaking authority granted elsewhere in that same document.[7] *See* ASUM Const.

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[6]According to *Black's Law Dictionary*, the elements establishing a public office are:

> position must be created by constitution, legislature, or through authority conferred by legislature, portion of sovereign power of government must be delegated to position, duties and powers must be defined, directly or impliedly, by legislature or through legislative authority, duties must be performed independently without control of superior power other than law, and position must have some permanency and continuity.

Black's Law Dictionary 1107 (5th ed. 1979).

[7]Indeed, the General Welfare Clause of the United States Constitution is the *source* of much federal regulation.

Art. 2, § 3. Students cannot avoid ASUM government as they might avoid an optional class. Any student enrolled half-time is assessed an activity fee and is thereby an ASUM member and subject to ASUM government. ASUM funds and oversees university student groups, substantively affecting their rights and duties. The activity fees ASUM disburses are public funds.

If ASUM government is merely an educational tool subsumed under UM's educational mission, it is difficult to reason why this Court has held that the First Amendment requires that student government use student activity fees to fund student groups' activities in a viewpoint-neutral way. *See Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000). The structure and function of ASUM and its government is almost identical to that of the Associated Students at Madison ("ASM"), and this Court did not consider ASM to be primarily an educational tool subsumed under the University of Wisconsin's educational mission, and it did not hesitate to consider ASM's decisions as law subject to the full force of the First Amendment.[8] UM fails to justify

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See generally Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 Kan. L. Rev. 1 (2003).

[8] As this Court said:

> The responsibility for governing the University of Wisconsin System is vested by law with the board of regents. § 36.09(1). The same law empowers the students to share in aspects of the University's governance. One of those functions is to administer the student activities fee program. By statute the "[s]tudents in consultation with the chancellor and

treating ASUM government and its elections as subject to its educational interests.

II. UM Casts Doubt on the Validity of its Interests in the Limits.

The University has offered an "equalizing speech" justification for the limits that was not considered by the lower court or addressed in Aaron's Petition. Br. Opp. 18. If this Court considers this new justification, it should also consider whether the limits are underinclusive, casting doubt on whether they were, in fact, adopted for the purposes relied on by the lower court. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) ("*White*").

Where considerable First Amendment freedoms are at stake, a state must "demonstrate its commitment to advancing [its] interest by applying its prohibition evenhandedly." *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). *See also City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994). If the education of student leaders is served by "requir[ing] student candidates to focus on desirable qualities such as the art of persuasion, public

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> subject to the final confirmation of the board [of regents] shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities." § 36.09(5). The students do so, in large measure, through their student government, called the Associated Students of Madison (ASM), and various ASM subcommittees. The program the University maintains to support the extracurricular activities undertaken by many of its student organizations is the subject of the present controversy.

Id. at 222.

speaking, and answering questions face-to-face with one's potential constituents," App. 36a, then UM should–but does not–limit the speech of student candidates for office in other student organizations.[9]

For example, student candidates running for office in the American Humanics Student Association (AHSA), one of many ASUM "Member Organizations," self-described as "[d]edicated to enriching professional leadership potential in the field of non-profit youth and human service administration,"[10] are not subject to any limit on their speech. Yet persuasion, public speaking and answering questions in person are as desirable in AHSA student candidates as ASUM student candidates. Likewise, UM imposes no expenditure limits on Member Organization elections to ensure that a "wealthy student . . . [cannot] buy a first shot" at the educational opportunity of leadership in organizations like the AHSA. Br. Opp. 7.

The spending limits are also "woefully underinclusive," *White*, 536 U.S. at 780, if the "'pri-

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[9]According to the ASUM Constitution, Article 6, § 4(a), "member groups shall adhere to the ASUM Constitution, Bylaws, and Fiscal Policy," and ASUM's Board on Member Organizations "shall monitor compliance of ASUM member groups with ASUM Bylaws, Constitution, and policies." *Id.* Article 6, § 1; *See also id.* § 4(b) (member groups to "define goals and to adhere to practices described in their constitutions or statements of process, *as approved by the Board on Member Organizations* (emphasis added)). But the expenditure limits apply only to candidates for office in ASUM, App. 70a, where the size of the electorate and the number of issues raised militate against limiting candidates' expenditures.

[10]*See* http://www.umt.edu/asum /stg_ac.htm,

mary intent' of imposing them is 'to prevent student government's being diverted by interests other than ones educational.'" App. 35a-36a (citation omitted). For example, as Respondent Gail Price has noted, "ASUM officers and Senate members engage in lobbying the state legislature on a variety of issues." Record 29. Yet there are no limits on spending guarding ASUM's educational purposes from being diverted to lobbying. Likewise, ASUM officers and Senate members "having greater financial resources," Br. Opp. 18, are not made to limit their political and social advocacy from the bully pulpits supplied by their positions after election, and "the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head." *White*, 536 U.S. at 781. The limits fall far short of protecting any interests offered by UM.

III. This Controversy Is Not Moot.

The University claims that Aaron's claims are moot and not saved by the expungement exception because a record of "negative information derived from allegedly unconstitutional school regulations," App. 9a, does not suffice to show "continuing injury for Article III purposes." Br. Opp. 32. The University admits that these records exist, Br. Opp. 9-10, *see also* App. 11a n.3, but argues that "no precedent of this Court authoriz[es] . . . [the] presumption" that their existence effects an ongoing injury.

The University's argument is essentially that, because this Court has never said that such a presumption is proper in a civil case, it is not proper, and the Ninth Circuit should not have relied on its own precedents in finding ongoing injury here. But the Ninth Circuit is not alone in its position. Requiring a

plaintiff seeking expungement in a civil case to present evidence of an ongoing injury from adverse records would also conflict with the law of at least four other Circuits.[11]

Moreover, UM concludes that, because this Court has held that criminal convictions are presumed to effect an ongoing injury, but has not held so for civil records, a plaintiff must show evidence of ongoing injury from the civil records to avoid mootness. Br. Opp. 32-33.[12] This Court has not had occasion to address whether retaining adverse university student records is an ongoing injury, but in *Church of Scientology of California v. U.S.*, it held that the plaintiff's claims were not moot so long as the government retained copies of records that the church claimed were unlawfully acquired. 506 U.S. 9 (1992). The Court

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[11] *See, e.g., Doe v. Pulaski County Special School Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (pupil) (en banc) (*citing Kerr v. Farrey*, 95 F.3d 472, 476 (7th Cir.1996)); *Sun Oil Co. of Pa. v. N.L.R.B.*, 576 F.2d 553, 558 n.3 (3d Cir. 1978) (employer) (*citing Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974)), *abrogation on other grounds recognized by CPS Chem. Co. v. N.L.R.B.*, 160 F.3d 150, 153 (3d Cir. 1998); *Sullivan v. Murphy*, 478 F.2d 938, 961 (D.C. Cir.) (Vietnam-era demonstrators), *cert. denied*, 414 U.S. 880 (1973); *see also Kansans for Life, Inc. v. Gaede*, 38 F. Supp. 2d 928, 932 (D. Kan. 1999) (group engaging in issue advocacy) (collecting cases).

[12] UM casts *Lane v. Williams*, 455 U.S. 624 (1982), as suggesting the presumption should not be applied here. But there, the plaintiffs had not claimed that parole was wrongfully revoked, or asked that their records be expunged, and the relief sought–correction of a sentence–could not provide effective relief, as it would leave the record intact. *Id.* at 632-33, n.14.

noted that "[t]axpayers have an *obvious* possessory interest in their records" and a constitutionally protected right to privacy injured by government's retaining even copies of the records. *Id.* at 13 (emphasis added). The only evidence of ongoing injury noted was the church's vigor in seeking return of the records. *Id.*

Finally, Aaron need not challenge the reporting requirements for this Court to grant effective relief. If the expenditure limits are found unconstitutional, "declaratory relief would require the University to expunge any and all records of Flint's censure and Senate seat denial," App. 10a, the relief Aaron seeks.

Conclusion

This Court should grant Aaron's petition and vacate the Ninth Circuit's decision and remand the case for reconsideration in light of *Morse*, 127 S. Ct. 2618 or, in the alternative, this Court should grant certiorari and set the case for briefing on the merits.

Respectfully submitted,

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